

Patrick J. Donovan
 Direct Phone: (202) 373-6057
 Direct Fax: (202) 424-7647
 Patrick.donovan@bingham.com

VIA HAND DELIVERY AND ECFS

August 8, 2007

Marlene H. Dortch, Secretary
 Office of the Secretary
 Federal Communications Commission
 445 12th Street, SW
 Suite 5-C327
 Washington, DC 20554

FILED/ACCEPTED

AUG - 8 2007

Federal Communications Commission
 Office of the Secretary

REDACTED - FOR PUBLIC INSPECTION**Re: WC Docket No. 05-25, RM 10593**

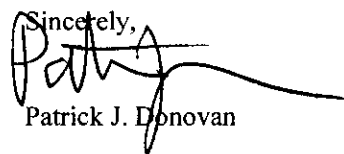
Dear Secretary Dortch:

On behalf of ATX Communications, Inc., Bridgecom International, Inc., Broadview Networks, Inc., Cavalier Telephone, LLC, Deltacom, Inc., Integra Telecom, Inc., Lightyear, Inc., McLeodUSA Telecommunications Services, Inc., Penn Telecom, Inc., RCN Telecom Services, Inc., SAVVIS, INC., and U.S. Telepacific Corp. d/b/a Telepacific Communications, enclosed for filing in WC Docket No. 05-25 is the original and four copies of the redacted version of their comments, which includes the Declarations of Kevin Albaugh, Don Eben, and Steven H. Brownworth. Also attached are two additional copies of these comments for filing in RM-10593. A copy of this filing is also being submitted in the Commission's Electronic Comment Filing System (ECFS).

Please note that one copy of the confidential version of this filing is being provided to you and two copies of the confidential version are being provided to Pam Arluk or Margarit Daily, Wireline Competition Bureau, under separate cover.

An extra copy of this filing is also attached. Please date stamp and return it to the courier.

Should you have any questions about this filing, please contact me.

Sincerely,

 Patrick J. Donovan

Enclosure

cc: Margaret Dailey (all via e-mail)
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 List ABCDE

Bingham McCutchen LLP
 2020 K Street NW
 Washington, DC
 20006-1806

T 202.373.6000
 F 202.373.6001
 bingham.com

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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Office of the Secretary

In the Matter of)	
)	
Special Access Rates for Price Cap)	WC Docket No. 05-25
Local Exchange Carriers)	
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AT&T Corp. Petition for Rulemaking to Reform)	
Regulation of Incumbent Local Exchange Carrier)	RM-10593
Rates for Interstate Special Access Services)	

COMMENTS OF

ATX COMMUNICATIONS, INC.
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DELTACOM, INC.
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LIGHTYEAR, INC.
MCLEODUSA TELECOMMUNICATIONS SERVICES, INC.
PENN TELECOM, INC.
RCN TELECOM SERVICES, INC.
SAVVIS, INC.
U.S. TELEPACIFIC CORP. D/B/A TELEPACIFIC COMMUNICATIONS

Andrew D. Lipman
Eric J. Branfman
Patrick J. Donovan
Philip J. Macres
BINGHAM MCCUTCHEN LLP
2020 K Street, N.W.
Washington, DC 20006
(202) 373-6000

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Attachments:

Attachment 1	Declaration of Don Eben
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Attachment 5	List of Various State Commission Decisions In The Northeast Discussing Section 271

Summary

Although the Commission has called for additional comments, the current record amply justifies prompt reform of the Commission's special access pricing rules that apply to price cap ILECs. The current record shows that BOCs have the ability to charge exorbitant and increasing prices and impose other unreasonable terms and conditions because they control access to the overwhelming majority of customer locations. The current record also demonstrates that BOCs are exploiting their control of access to customer locations by charging prices that dramatically exceed any reasonable estimate of forward-looking cost, which in turn produce excessive rates-of-return. In addition, BOCs are imposing anticompetitive conditions such as region-wide commitments that have no relationship to cost.

Experience since 2005 provides further evidence that the Commission's special access pricing rules are fatally flawed and in dire need of reform. Prices and unconscionable rates of return, which were unlawful in 2005, have increased and remain unlawful. In 2006, the BOCs' special access rates-of-return averaged an astounding 78 percent rate-of-return. This return far exceeds the Commission's last authorized rate-of-return of 11.25 percent and provides further evidence the Commission's regulatory framework governing special access pricing has failed because it is not producing reasonable rates. A quick review of the much lower rates that BOCs are assessing for retail services that have far greater speeds than a special access DS1 circuit demonstrates that special access rates are patently unreasonable. In fact, the BOCs' overcharges yielded an incredible \$8.31 billion in excessive special access revenues or \$22.78 million in overcharges per day in 2006.

The BOCs' anticompetitive conduct continues today because they remain in control of last mile bottleneck facilities. Recent BOC mergers have exacerbated the potential for BOC abuse of this control by eliminating actual and potential competitors and by increasing BOCs' incentive and ability to discriminate against competitors. Conditions imposed on these mergers do not eliminate the need for special access reform because they are temporary, do not apply to all price cap ILECs, permit unreasonable prices to remain, and do not address the most serious unreasonable terms and conditions. BOCs have no incentive to offer commercially reasonable alternatives to their standard DS1 and DS3 special access service offerings. In fact, affected CLECs are withdrawing or are planning to withdraw from service areas where BOCs have been or may be granted forbearance from their § 251(c)(3) loop and transport unbundling obligations because the BOCs' excessive special access prices prevent CLECs from offering competitive local exchange services.

The GAO issued a report in November of 2006 that confirms that significant reform of the special access pricing regime is warranted. The GAO found that facilities-based competition to end users is not extensive and that competitive alternatives exist in only a relatively small set of buildings; that prices for special access services in MSAs with Phase II pricing flexibility are on average higher than prices elsewhere; and that the effects of Phase I and Phase II pricing flexibility contracts on prices serve to impede rather than promote competition.

The Commission should reinitialize special access prices at cost-based, forward-looking levels using state approved UNE rates as proxies. As an alternative, the Commission could invite BOCs to file forward-looking cost studies. The Commission's price cap regime should include an X-factor of 10-11 percent for special access, sharing requirements, and separate

baskets for DS1, DS3, OCn, mass market broadband and DSL, and retail special access. The Commission should also abolish Phase II pricing flexibility. There is no theoretical or practical justification for BOCs to raise prices in response to competition because competition should produce price reductions. The Commission should not permit conditions on volume and term discounts that are not reasonably related to costs or efficiencies of providing volume and term offerings. Finally, the Commission should adopt a "fresh look" so that customers locked in by current unreasonable BOC tariffs may choose another provider. This opportunity should only be at the election of the special access customer.

TABLE OF FREQUENTLY USED SHORT CITATIONS

Federal Decisions

<i>Verizon</i>	<i>Verizon Communications, Inc. v. FCC</i> , 535 U.S. 467 (2002)
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FCC Decisions

<i>1996 Access Charge Reform NPRM</i>	<i>Access Charge Reform</i> , CC Docket No. 96-262, Notice of Proposed Rulemaking, 11 FCC Rcd 21354 (1996)
<i>1997 Price Cap Review Order</i>	<i>Price Cap Performance Review for Local Exchange Carriers</i> , Fourth Report and Order in CC Docket No. 94-1 and Second Report and Order in CC Docket No. 96-262, 12 FCC Rcd 16642 (1997) (subsequent history omitted)
<i>AT&T-BellSouth Merger Order</i>	<i>AT&T Inc. and BellSouth Corporation Application for Transfer of Control</i> , WC Doc. No. 06-74, Memorandum Opinion and Order, FCC 06-189 (rel. Mar 26, 2007)
<i>AT&T-BellSouth Merger Order on Reconsideration</i>	<i>AT&T Inc. and BellSouth Corporation Application for Transfer of Control</i> , WC Doc. No. 06-74, Order on Reconsideration, FCC 07-44 (rel. Mar 26, 2007)
<i>Access Charge Reform Order</i>	<i>Access Charge Reform</i> , CC Docket Nos. 96-262, 94-1, 91-213, 95-72, First Report and Order, 12 FCC Rcd 15982 (1997) (subsequent history omitted).
<i>AT&T Price Cap Order</i>	<i>Policy and Rules Concerning Rates for Dominant Carriers, Report and Order and Second Further Notice of Proposed Rulemaking</i> , 4 FCC Rcd 2873 (1989)
<i>CALLS Order</i>	<i>Access Charge Reform</i> , CC Docket Nos. 96-262, 94-1, 99-249, 96-45, Sixth Report and Order in CC Docket Nos. 96-262 and 94-1, Report and Order in CC Docket No. 99-249, Eleventh Report

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	and Order in CC Docket No. 96-45, 15 FCC Rcd 12962 (2000) (subsequent history omitted)
<i>LEC Price Cap Order</i>	<i>Policy and Rules Concerning Rates for Dominant Carriers</i> , CC Docket No. 87-313, Second Report and Order, 5 FCC Rcd 6786 (1990) (subsequent history omitted)
<i>Local Competition Order</i>	<i>Implementation of the Local Competition Provisions of the Telecommunications Act of 1996</i> , CC Docket No 96-98, First Report and Order 11 FCC Rcd 15499 (1996) (subsequent history omitted)
<i>Omaha Forbearance Order</i>	<i>Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. §160(c) in the Omaha Metropolitan Statistical Area</i> , Memorandum Opinion and Order, WC Docket No. 04-223, 20 FCC Rcd 19415 (2005)
<i>Pricing Flexibility Order</i>	<i>Access Charge Reform</i> , CC Docket No. 96-262, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221 (1999) (subsequent history omitted)
<i>SBC-Ameritech Merger Order</i>	<i>Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, For Consent to Transfer of Control</i> , Memorandum Opinion and Order, CC Docket No. 98-141, 14 FCC Rcd 14712, (1999).
<i>SBC-AT&T Merger Order</i>	<i>SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control</i> , WC Doc. No. 05-65, Memorandum Opinion and Order, 20 FCC Rcd 18290 (rel. Nov. 17, 2005)
<i>TRO</i>	<i>Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability</i> , Report and

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	Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (2003), <i>corrected by</i> Errata, 18 FCC Rcd 19020 (2003), <i>aff'd in part, remanded in part, vacated in part, United States Telecom Ass'n v. FCC</i> , 359 F.3d 554 (D.C. Cir. 2004), <i>cert. denied sub nom. Nat'l Ass'n Regulatory Util. Comm'rs v. United States Telecom Ass'n</i> , 125 S. Ct. 313 (2004)
<i>TRRO or Triennial Review Remand Order</i>	<i>Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers</i> , Order on Remand, 20 FCC Rcd 2533 (2005), <i>aff'd, Covad Commc'ns Co. v. FCC</i> , 450 F.3d 528 (D.C. Cir. 2006)
<i>Special Access NPRM</i>	<i>Special Access Rates for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services</i> , WC Docket No. 05-25, RM-10593, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 1994, FCC 05-18 (rel. Jan. 31, 2005).
<i>Verizon-MCI Merger Order</i>	<i>Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control</i> , WC Docket No. 05-75, Memorandum Opinion and Order, 20 FCC Rcd 18433 (2005)

Ex Parte and Other Filings

Ad Hoc 6/13/05 Comments	Comments of the Ad Hoc Telecommunications Users Committee, WC Doc. No. 05-25 (filed June 13, 2005)
Ad Hoc 6/13/05 Declaration of Susan Gately	Comments of the Ad Hoc Telecommunications Users Committee, Declaration of Susan M. Gately WC Doc. No. 05-25 (filed June 13, 2005)
Ad Hoc 7/29/05 Reply Comments	Reply Comments of the Ad Hoc Telecommunications Users Committee, WC Doc. No. 05-25 (filed July 29, 2005)

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Ad Hoc 7/29/05 Reply Declaration of Susan Gately	Comments of the Ad Hoc Telecommunications Users Committee, Reply Declaration of Susan M. Gately WC Doc. No. 05-25 (filed July 29, 2005)
AT&T 10/15/02 Declaration of Kenneth Thomas	Petition for Rulemaking of AT&T, Declaration of Kenneth Thomas, RM-10593 (filed Oct. 15, 2002)
BellSouth 6/15/05 Comments	Comments of BellSouth, WC Doc. No. 05-25, (filed June 13, 2005)
Broadwing <i>et al.</i> 6/13/05 Comments	Comments of Broadwing Communications, LLC and Savvis Communications Corporation, WC Doc. No. 05-25 (filed June 13, 2005)
BT Americas 6/13/05 Comments	Comments of BT Americas Inc., WC. Doc. No. 05-25 (June 13, 2005)
COMPTEL <i>et al.</i> 6/13/05 Comments	Comments of CompTel/ALTS, Global Crossing North America, Inc., and NuVox Communications, WC Doc. No. 05-25 (filed June 13, 2005)
COMPTEL 6/13/05 Declaration of Janet Fischer	Comments of CompTel/ALTS, Global Crossing North America, Inc., and NuVox Communications, Declaration of Janet S. Fischer, WC Doc. No. 05-25 (filed June 13, 2005)
COMPTEL <i>et al.</i> 7/29/05 Comments	Comments of CompTel/ALTS, Global Crossing North America, Inc., and NuVox Communications, WC Doc. No. 05-25 (filed July 7, 2005)
Declaration of Lee Selwyn (dated Nov. 8, 2004) (filed in RM-10593 Dec. 7, 2004)	Letter from David L Lawson, Counsel for AT&T, to Marlene H. Dortch, Secretary, RM 10593 (attaching, inter alia, "Letter from C. Frederick Beckner III to Marlene H. Dortch, dated November 8, 2004 (with ex parte Declaration of Lee Selwyn)") (filed Dec. 7, 2004)
Declaration of M. Joseph Stith (dated Oct. 4, 2004) (filed in RM-10593 Dec. 7, 2004)	Letter from David L Lawson, Counsel for AT&T, to Marlene H. Dortch, Secretary, RM 10593 (attaching, inter alia, "Declaration of M. Joseph Stith (October 4, 2004)") (filed in RM-10593 Dec. 7, 2004)
GAO Report	U.S. GENERAL ACCOUNTABILITY OFFICE, REPORT

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Lightyear, McLeodUSA, RCN, SAVVIS, Telepacific
WC Docket No. 05-25
August 8, 2007

	TO THE TO THE CHAIRMAN., COMMITTEE ON GOVERNMENT REFORM, HOUSE OF REPRESENTATIVES - TELECOMMUNICATIONS, "FCC NEEDS TO IMPROVE ITS ABILITY TO MONITOR AND DETERMINE THE EXTENT OF COMPETITION IN DEDICATED ACCESS SERVICES (November 2006)
Joint CLECs 6/13/05 Comments	Comments of ATX Communications Services, Inc., BridgeCom International, Inc., Broadview Networks, Inc., Pac-West Telecom, Inc., US LEC Corp, and U.S. Telepacific Corp. d/b/a Telepacific Communications, WC Doc. No. 05-25 (filed June 13, 2005)
Joint CLECs 7/29/05 Reply Comments	Reply Comments of ATX Communications Services, Inc., BridgeCom International, Inc., Broadview Networks, Inc., Pac-West Telecomm, Inc., US LEC Corp, and U.S. Telepacific Corp. d/b/a Telepacific Communications, WC Doc. No. 05-25 (filed July 29, 2005)
ETI White Paper	Comments of the Ad Hoc Telecommunications Users Committee, Attachment A - Economics and Technology, Inc., <i>Competition in Access Markets: Reality or Illusion – A Proposal for Regulating Uncertain Markets</i> dated August 2004, WC Doc. No. 05-25 (filed June 13, 2005)
Reply Declaration of Lee Selwyn (dated Oct. 19, 2004) (filed in RM-10593 Dec. 7, 2004)	Letter from David L Lawson, Counsel for AT&T, to Marlene H. Dortch, Secretary, RM 10593 (attaching, inter alia, "Reply Declaration of Lee Selwyn (October 19, 2004)") (filed Dec. 7, 2004)
SBC 6/13/05 Declaration of Parley Castro	Comments of SBC Communications, Inc., Declaration of Parley C. Castro, WC Doc. No. 05-25 (filed June 13, 2005)
Sprint 6/13/05 Comments	Comments of Sprint Corporation, WC Doc. No. 05-25 (filed June 13, 2005)
T-Mobile 6/13/05 Comments	Comments of T-Mobile USA, Inc., WC Doc. No. 05-25 (filed June 13, 2005)
T-Mobile 6/13/05 Declaration of Simon J.	Comments of T-Mobile USA, Inc., Declaration of

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Wilkie	Simon J. Wilkie, WC Doc. No. 05-25 (filed June 13, 2005)
Verizon 6/13/05 Declaration of William Taylor	Comments of Verizon, Declaration of William E. Taylor, WC Doc. No. 05-25 (filed June 13, 2005)
WilTel 6/13/05 Comments	Initial Comments of WilTel Communications, LLC, WC Doc. 05-25 (filed June 13, 2005)

Before the
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ATX Communications, Inc., Bridgecom International, Inc., Broadview Networks, Inc., Cavalier Telephone, LLC, Deltacom, Inc., Integra Telecom, Inc., Lightyear, Inc., McLeodUSA Telecommunications Services, Inc., Penn Telecom, Inc., RCN Telecom Services, Inc., SAVVIS, INC., and U.S. Telepacific Corp. d/b/a Telepacific Communications submit these comments in response to the Commission's request that parties refresh the record in this proceeding.¹

¹ *Parties Asked to Refresh Record in the Special Access Notice of Proposed Rulemaking, Public Notice, WC Docket No. 05-25, RM-10593, FCC 07-123, released July 9, 2007.*

**I. THE EXISTING RECORD JUSTIFIES REFORM OF RULES
GOVERNING SPECIAL ACCESS**

Although the Commission has called for additional comments, the previous record gathered by the Commission in response to the *Special Access NPRM*, as well as in response to AT&T's petition for rulemaking, justifies prompt reform of rules governing provision of special access by price cap ILECs. The record already shows that the underpinning of BOCs' ability to charge high and increasing prices, and to impose unreasonable non-price terms and conditions, is that BOCs control access to the overwhelming majority of customer locations within their respective regions. AT&T Corp. in its initial petition showed that, despite its ownership of one of the most extensive national networks, its large traffic volumes, superior resources, and bargaining power, it was dependent on the BOCs for access to customer locations in the vast majority of situations. It reported that it had facilities to only about 6,000 of the 3 million commercial buildings in the country – a mere one-fifth of one percent.² Further, AT&T acknowledged that it relied on ILEC last mile special access channel terminations 95% of the time in reaching commercial buildings and was able to utilize a CLEC alternative for only 2% of its needs.³ Numerous other commenters with first hand experience in seeking alternatives to BOC services confirmed their dependence on BOCs for last mile access.⁴ And even where a

² AT&T 10/15/02 Declaration of Kenneth Thomas, at 1.

³ *Id.*

⁴ MCI reported a comparable dependence on ILEC special access circuits and estimated that 90% of its off-net special access circuits were provisioned by ILECs. *Performance Measures and Standards for Interstate Special Access*, CC Docket No. 01-321, Comments of WorldCom, Inc. Corporation, at 9-10 (Jan. 22, 2002); Broadwing 6/13/05 Comments at 14 (“[w]ith relatively few exceptions – predominantly owned by AT&T and MCI – the ILECs own the *only* last mile link to the target buildings and, therefore, anyone who wants to serve customers in those buildings must either purchase access from the ILEC or from another carrier

competitive provider offers special access to a location, building access issues might nonetheless result in the BOC being the only provider of access to most customers in a building.⁵

The record also demonstrates that intermodal providers do not provide a realistic alternative to BOC special access for a number of reasons. Cable operators do not offer wholesale access, and where they have facilities, they are not generally able to provide the robust level of service that business customers in particular require.⁶ Similarly, the existing record shows that fixed wireless is an inadequate replacement for wireline special access services because of operational and security concerns and because it is available only to a tiny percentage of business customer lines.⁷ And the Commission itself had already found before initial comments were filed that BOCs control access to the vast majority of customer locations⁸ and that intermodal alternatives are not viable substitutes to wireline services.⁹

reselling the ILEC's services.") ETI White Paper at iv, 12, 16.(ILECs "remain the sole source of connectivity at roughly 98% of all business premises nationwide, even for [these] largest corporate users.")

⁵ ETI White Paper at 18, n.32; Comments of Sprint Corporation, RM Doc. No. 10593, at 4 (filed Dec. 2, 2002).

⁶ ETI White Paper at 27.

⁷ ETI White Paper at 23-24. (Fixed wireless accounts for only about 25,000 enterprise lines nationwide which, assuming they were all special access lines, would amount to less than two hundredths of a percent of the special access market)

⁸ The Commission concluded that competing carriers were impaired absent unbundled DS1 transport, DS3 transport, and DS1 loops in all but 5.4%, 8.5%, and 0.5% respectively of BOC wire centers. *TRRO*, ¶¶ 5, 24, 115, 118-119, n.337, 126; 129-130, 146, 166, 171-174, 178-179 ("competitive deployment of stand-alone DS1-capacity loops is rarely if ever economic"); *TRO*, ¶¶ 386-387, 391-392.

⁹ *TRRO*, ¶ 193 ("record contains little evidence that cable companies are providing service at DS1 or higher capacities," and in fact "suggests that most of the businesses served by cable companies are not large enterprise customers, but mass market small businesses that would never generate enough traffic to require a high-capacity loop.").

Nor is there any doubt on the present record that BOCs are exploiting their control over access to customer locations. The Commission's predictive judgment in the *Access Charge Reform Order*¹⁰ was that competition would have long before now reduced special access prices to forward looking cost.¹¹ But a comparison to prices for the same services and facilities that have been set at forward looking cost has shown that special access prices are excessive. As of two years ago, prices for BOC special access DS 1 loops ranged from 125% to nearly 400% above comparable UNE prices for the same services and facilities.¹² Even considering that TELRIC pricing for UNEs is under consideration by the Commission and even if TELRIC were modified at the request of the BOCs, this comparison shows that special access prices are excessive under any reasonable estimate of forward looking costs. At the time initial comments in this proceeding were filed, the BOCs' rates-of-return for interstate special access service based on their own ARMIS reporting data were substantially above the Commission's maximum prescribed reasonable rate-of-return of 11.25%. As of the year ended 2004, the BOCs' special access rates of return were as follows: Verizon – 31.6%, SBC – 76.2%, Qwest – 76.8% and BellSouth – 81.2%. Overall, the BOCs averaged a 53.7 percent rate-of-return.¹³ And, as shown

¹⁰ *Access Charge Reform Order*, ¶ 42, 44, 263-265.

¹¹ *Access Charge Reform Order*, ¶ 44.

¹² T-Mobile 6/13/05 Declaration of Simon J. Wilkie, ¶ 19, Appendix 2, at 1.

¹³ Ad Hoc 6/13/05 Declaration of Susan M. Gately, ¶ 9. These excessive rates-of-return for interstate special access occur within the context of excessive earnings for interstate services as a whole. BellSouth's, Qwest's, SBC's, and Verizon's total interstate returns for 2004 were 20.3, 28.7, 22.2. and 15.9 percent, respectively. ARMIS Report 43-01, Table I, Column (h), Row 1915/Row 1910; *see also* Comments of SBC, Declaration of David Toti, Attachment 7, WC Doc 05-25 (filed June 13, 2005). As shown below, BOCs' average rate-of-return for all interstate services in 2006 was 26.13%. BOCs' excessive overall interstate earnings refutes any argument that excessive earnings in special access are offset by underearning elsewhere.

in later sections of these comments, these rates-of-return have continued to skyrocket. Although BOCs were invited to do so, they have declined so far in this proceeding to provide a study demonstrating their forward looking costs or showing their rate-of-return under any reasonable methodology.

Moreover, the record already shows that the Commission's pricing flexibility rules misidentify areas where competition might be sufficient to constrain BOC prices for special access. The Commission's test for Phase II pricing flexibility has merely allowed BOCs to raise prices. BOC special access prices in most instances are significantly higher than (sometimes more than double) the rates charged for the same services under price cap regulation.¹⁴ For example, as shown in Table 1 below, Qwest's special access DS1 rates have increased dramatically since it obtained Phase II special access pricing flexibility in the Omaha MSA. The rates are significantly higher than the price cap DS1 rates that would apply had it not received Phase II special access pricing relief:

Table 1								
Comparison of Qwest's DS1 Channel Termination Non-Plan Price Cap Rates With Phase II Pricing Flexibility Rates								
Month to Month Rates (No Term)			1 Year Term Monthly Rates			2 Year Term Monthly Rates		
Price Cap ¹⁵	Price Flexibility ¹⁶	% Increase	Price Cap	Price Flexibility	% Increase	Price Cap	Price Flexibility	% Increase
\$120.00	\$175.00	45.83%	\$116.40	\$166.00	42.61%	\$114.00	\$150.00	31.58%

Moreover, Qwest's monthly pricing flexibility rate for 10 miles of DS1 transport is 48% higher than the corresponding price cap rate.¹⁷

¹⁴ Sprint 6/13/05 Comments at 5.

¹⁵ See Qwest - FCC No. 1 Section 7.11.4, at 7-347 (same cite applies to the 1 and 2 year term price cap rates shown in Table 1).

¹⁶ See Qwest - FCC No. 1 Section 17.2. 11, at 17-91 (same cite applies to the 1 and 2 year term Phase II pricing flexibility rates shown in Table 1).

Other evidence in the record also reveals that based on various term rates Qwest's DS1 channel terminations are 22 to 47 percent higher in Qwest pricing flexibility areas than under Qwest's price caps and DS1 mileage rates are 13 to 71 percent higher in BellSouth pricing flexibility areas than under BellSouth's price caps.¹⁸ BellSouth did not contest the fact that its month-to-month prices for DS1 and DS3 special access services had increased and conceded that by 2005 these tariffed rates had gone up by 8 to 9 percent.¹⁹ SBC did not dispute the fact that its Phase II basic tariff rates are higher than those in price cap MSAs.²⁰ For its part, rather than provide readily available price information that could have refuted that it has raised prices, Verizon attempted to change the subject to comparisons of voice grade equivalent revenues in an effort to mask its abuse of pricing flexibility.²¹ Thus, on the current record, BOCs have not been able to justify price increases where pricing flexibility has been granted. If the Commission's rules accurately identified competitive areas, prices would be *lower* in areas where showings of competition justify Phase II pricing flexibility under FCC rules, not higher than where prices remain subject to price caps.

As the Commission has observed, market power can be evidenced through unreasonable terms and conditions of service in addition to excessive prices.²² The current record shows this

¹⁷ Compare Qwest FCC No. 1 Section 7.11.4.C.1.a, at 7-354.1 (the price cap rate for a 10 mile DS1 circuit is \$170.00), with Qwest FCC No. 1 Section 17.2.11.C.1.a, at 17-98 (Phase II pricing flexibility rate for a 10 mile DS1 circuit is \$252.00).

¹⁸ COMPTTEL *et al.* 6/13/05 Comments at 7, COMPTTEL 6/13/05 Declaration of Janet S. Fisher, ¶ 5 & Table 1.

¹⁹ BellSouth 6/15/05 Comments at 14-16.

²⁰ SBC 6/13/05 Declaration of Parley Castro, at n.49.

²¹ Verizon 6/13/05 Declaration of William E. Taylor, ¶ 16.

²² *Special Access NPRM*, ¶¶ 114-125.

to be the case. Commenters point out, for example, that the Commission has found that BellSouth had unlawfully discriminated against interexchange carriers by offering a term and volume discount plan that was especially favorable to its own long distance affiliate.²³

Similarly, the record provides abundant evidence that BOCs tie unreasonable terms and conditions to volume discounts. For example, BOCs condition the availability of discounts to a customer's previous purchase level. While discounts that vary based on the *current* purchase level can be reasonable, BOC discounts based on prior purchase level are tantamount to growth discounts, which the Commission has proscribed.²⁴

Further, the current record shows that BOCs condition discounts on region-wide purchases and on limiting purchases from competitors or purchase of UNEs. For example, Qwest has recently insisted on a non-negotiable basis on region-wide purchases as a condition of providing special access discounts in Omaha, Nebraska.²⁵ AT&T continues to impose a 95%-98% Access Service Ratio, precluding CLEC customers from choosing UNEs where they are available, and discouraging end users from buying special access from competitive access providers unless the competitive providers can serve most or all of the end user's access needs.²⁶

²³ *AT&T Corp. v. BellSouth Telecommunications, Inc.*, File No. EB-04-MD-010, Memorandum Opinion and Order, FCC 04-278 (rel. Dec. 9, 2004).

²⁴ *Pricing Flexibility Order*, ¶¶ 134-135; see also Comments of AT&T Corp., WC Doc. 05-25, at 7 (filed June 13, 2005).

²⁵ Petition to Modify of McLeodUSA Telecommunications Services, Inc., WC Doc. No. 04-223, at 5 & 11 (filed July 23, 2007).

²⁶ See Pacific Bell Telephone Company, Tariff F.C.C. No. 1, Section 33.54, Contract Offer No. 54., Section 33.54.4(F); Pacific Bell Telephone Company, Tariff F.C.C. No. 1, Section 33.56, Contract Offer No. 56., Section 33.56.2(A)(4).

The Supreme Court antitrust case of *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951) is on point. There, a newspaper, whose advertising space was indispensable to local businesses, refused to sell advertising space to businesses that also advertised on a local radio station. This was held to be anticompetitive and in violation of Section 2 of the Sherman Act, 47 U.S.C. § 2. The BOC's conditions stifle competition in the same manner.

All of these conditions are unreasonable because they are unrelated to costs, or efficiencies that BOCs could experience when providing service on a volume or term commitment basis. These conditions express the BOCs' incentive and ability to extract concessions from carrier-customers who lack other alternatives to BOC services for access to customers in the vast majority of locations. By imposing these conditions, the BOC can effectively eliminate whatever competition it might otherwise face by making the choice of competitive service highly unattractive or impossible through ineligibility for discounts.

The BOCs' practices make it difficult or impossible for others to compete with them in the provision of special access unless they can offer special access wherever the BOC does. These conditions are no more than efforts by BOCs to "lock up" customers and prevent them from choosing competitive services.²⁷ BOC efforts to tie discounts to commitments unrelated to cost or efficiencies are closely analogous to, and may constitute, impermissible tying under antitrust law.²⁸

²⁷ See *Pricing Flexibility Order*, ¶ 79 (explaining that an incumbent can forestall the entry of potential competitors by "locking up" large customers by offering them volume and term discounts at or below cost).

²⁸ A claim for anticompetitive tying under § 1 or § 2 of the Sherman Act, is established where (1) there are two distinct products; (2) the defendant has power in the market for the tying product; (3) the defendant ties the two products together and will not sell the tied product without

As discussed in the next section of these comments, experience since the last round of comments reinforces the need for special access reform.

II. EXPERIENCE SINCE 2005 STRENGTHENS THE NEED FOR SPECIAL ACCESS REFORM

A. Prices and Unconscionable Rates-of-Return Have Increased and Remain Unlawful

The Commission recognizes that the level of competition in a market can be measured by the absence of substantial and sustained price increases. As numerous special access purchasers demonstrated in their comments filed in 2005, the Commission's special access regulatory regime has failed to discipline the BOCs' market power or prices for special access. Although, as shown above, they were already overearning on the provision of special access in 2004, since then they have since significantly raised their DS1 and DS3 special access rates where given Phase II pricing flexibility and have been able to retain customers despite these dramatic price increases.²⁹

The BOCs' behavior has continued and will continue absent regulatory restraints. For instance, since June 2005, Qwest's Phase II pricing flexibility rates for critical last mile DS1 facilities increased by approximately 25 percent³⁰ and are 47 percent higher than the price cap

the other; and (4) the tie forecloses a substantial volume of commerce. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 9, 16, 21-22 (1984); *United States v. Microsoft Corp.*, 253 F.3d 34, 58, 84 (D.C. Cir.), *cert. denied*, 122 S. Ct. 350 (2001); *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 462 (1992).

²⁹ See e.g., Joint CLECs 6/13/05 Comments, at 10-13; Joint CLECs 7/29/05 Reply Comments at 14-19.

³⁰ See Qwest FCC No. 1 Section 17.2.11.A.1, at 17-91(Price Flex). Since June of 2005, the DS1 zone 1 monthly rate increased from \$132.5 to \$165.

rates that would otherwise apply.³¹ Moreover, with respect to a Zone 1 DS1 circuit with two channel terminations and 10 miles of channel mileage, Qwest's and Verizon's pricing flexibility rates are, depending on the term of the contract, between 30 to 47 and 23 to 48 percent higher, respectively, than price cap rates.³² Moreover, with respect to a Zone 1 DS3 circuit with two channel terminations and 10 miles of channel mileage, Qwest's pricing flexibility rates are, depending on the term of the contract, between 53 to 68 percent higher, respectively, than price cap rates.³³

AT&T and Verizon have refrained to some extent from increasing their rates since the end of 2005 only because, as merger conditions, they agreed not to increase their Phase II special access pricing rates for 30 months.³⁴ At the end of 2006, AT&T agreed to reduce a limited set of its Phase II pricing flexibility rates for 48 months to price cap levels as a condition of obtaining FCC approval of its merger with BellSouth.³⁵ While these merger conditions were voluntary, competition did not force AT&T and Verizon to offer them. Rather, they were essentially imposed by the FCC in exchange for merger approval.

³¹ The monthly Zone 1 price cap rate is rate is \$112.30 and the pricing flexibility rate is \$165. Compare Qwest FCC No. 1 Section 7.11.4.A.1, p. 7-347 (Price Cap), with Qwest FCC No. 1 Section 17.2.11.A.1, at 17-91(Price Flex).

³² See Ad Hoc Comments, Declaration of Susan Gately, DS1 Pricing Comparisons (filed August 8, 2007).

³³ See Ad Hoc Comments, Declaration of Susan Gately, DS3 Pricing Comparisons (filed August 8, 2007).

³⁴ See *SBC-AT&T Merger Order*, at 122 & 124; *Verizon-MCI Merger Order*, at 132 & 134.

³⁵ *AT&T-BellSouth Merger Order on Reconsideration*, at 5; *AT&T-BellSouth Merger Order*, at 151. AT&T/BellSouth's merger condition originally required other BOCs and price cap ILECs to lower their Phase II rates as well as a precondition to obtaining such rates from AT&T/BellSouth; however, the other BOCs vigorously disputed this precondition on discrimination grounds and AT&T withdrew it. *AT&T-BellSouth Merger Order on Reconsideration*, ¶ 4.

AT&T is ignoring these commitments and planning to increase prices in the former BellSouth region for provision of dark fiber as a special access service, which it refers to as "dry fiber," through the ruse of terminating this offering and converting it to a "commercial offering."³⁶ Competitive carrier experience is that unregulated commercial offerings are invariably higher priced than the previous alternative. The Commission should consider this tactic when evaluating the extent of special access price increases absent price cap regulation.

In addition, the BOCs' steadily increasing and extraordinarily high rates-of-return since 2005 demonstrate that the Commission's regulatory framework governing special access pricing has failed because it is not producing reasonable rates. As of the year ended 2006, the BOCs' special access rates-of-return based on ARMIS data were as follows: AT&T - 100%; Qwest - 132%. Verizon - 52%. Overall, the BOCs averaged an astounding 78 percent rate-of-return.³⁷

These returns are not a short term phenomena. Indeed, since the passage of the Telecommunications Act of 1996 to the present, the average special access category earnings have steadily increased from 8.25³⁸ percent in 1996 to a remarkable 53 percent at the end of 2004.³⁹ They then jumped to 68 percent at the end of 2005 before hitting an all time high of 78

³⁶ Letter received by Deltacom addressed to Valued AT&T Customer from AT&T Southeast, entitled *AT&T Southeast Region 9-State - Discontinuance of Dry Fiber*, dated July 13, 2007.

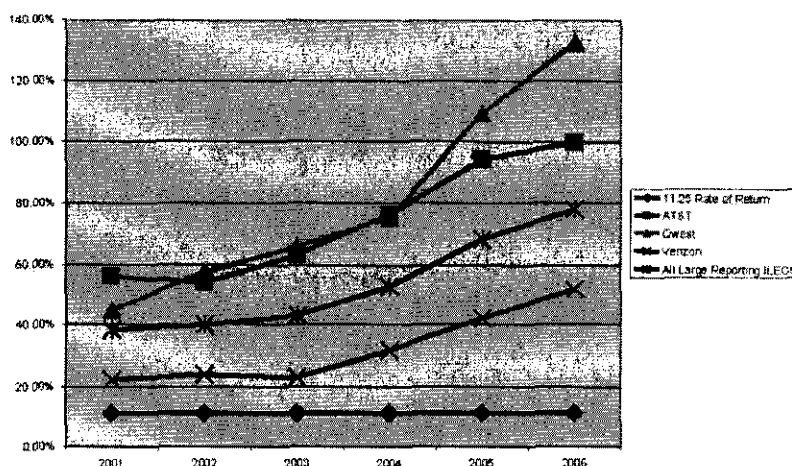
³⁷ The annual rates of return were calculated using ARMIS data reported for interstate special access services. Specifically, we divided the net return by average net investment to calculate the rates of return. See ARMIS 43-01, Table 1, Cost and Revenue, rows 1910, 1915, col. s.

³⁸ ETI White Paper at 29.

³⁹ Ad Hoc 6/13/05 Declaration of Susan Gately, ¶ 9.

percent at the end of 2006. Table 1 below illustrates the incredible increasing of rates of return among the BOCs from 2001-2006.⁴⁰

Table 1
Interstate Special Access ARMIS Rates of Return 2001-2006



While the BOCs have long argued that ARMIS data is irrelevant to assessing their rate-of-return for interstate special access, such claims should be rejected. ARMIS data is the BOCs' own reported data. It strains credulity for BOCs to claim it should be ignored. Moreover, ARMIS data was designed for the purpose of evaluating rate-of-return using BOCs' embedded costs and is completely appropriate for that purpose.⁴¹ Further, ARMIS data is showing such high rates-of-return that no amount of tweaking would show that BOCs are not earning unconscionable rates-of-return.⁴²

⁴⁰ AT&T's historical rates of return referenced in Table 1 reflect the returns of SBC and BellSouth on an aggregated basis.

⁴¹ ETI White Paper at 35.

⁴² See ETI White Paper at 29-28; Reply Declaration of Lee Selwyn (Oct. 19, 2004) (filed in RM-10593 Dec. 7, 2004) at 47-83; Declaration of Lee Selwyn (Nov. 8, 2004) (filed in RM-10593 Dec. 7, 2004) at 17-28; WC Docket No. 05-65, Reply Declaration of Lee Selwyn at 49-55 (May 10, 2005).